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Ferguson Electric Co., Inc. *and* Greg Messier *and* Robert Gauvin *and* Local 90, International Brotherhood of Electrical Workers, AFL–CIO. Cases 34–CA–7875–2, 34–CA–7875–3, and 34–CA–7930

August 24, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE AND WALSH

On September 24, 1998, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. In addition, the General Counsel filed a limited cross-exception and brief seeking a change in the Board's standard backpay order, and the Respondent filed an answering brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

We have adopted the judge's findings and conclusions in their entirety, including his finding that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Robert Gauvin. The judge's recommended Order contained the Board's standard remedial provisions requiring the Respondent to reinstate Gauvin and make him whole and, within 14 days of a request, to "make available to the Board or its agents . . . all payroll records . . . necessary to analyze the amount of backpay due under the terms of this Order."

In his limited cross-exceptions, the General Counsel asks the Board to amend its established "make records available" remedial order in this case and all backpay cases hereafter, to require respondents to:

> preserve and, within 14 days of request, provide at the office designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.[3]

The General Counsel contends that the proposed order would ensure prompt receipt of records necessary to calculate the amount of backpay due. He further contends that, as a matter of public policy, the burden of producing documents necessary to determine the amount of backpay due should be borne by respondents who have been adjudicated as wrongdoers and, thus, should bear the costs of violating the Act.

We find substantial merit in the General Counsel's arguments. Accordingly, in this and all subsequent backpay cases, we shall order respondents to provide the requisite records at a place designated by the Board or its agents (usually the Board's Regional Directors).[4] However, in conferring on the Regional Directors the authority to designate the place for production of records, we do not intend to establish a rule invariably requiring records to be delivered to the Board's offices, as we are

[1] Subsequently, the Board invited supplemental briefs regarding the following issues raised by the General Counsel's limited cross-exception:

1. Is it within the Board's authority to require a respondent employer, in backpay cases, to produce payroll records to an office designated by the Board?
2. Is there a need to establish such a standard requirement in all backpay cases?
3. What public policy interests support the establishment of such a requirement? What public policy interests weigh against such a requirement? Are there prudential considerations, such as the Board's budgetary and administrative constraints, which the Board should consider in deciding whether to require a respondent to produce payroll records to an office designated by the Board?
4. If the Board decides to establish such a policy, what factors should be considered in determining the locus and timing for delivery of the records? What standard should be applied to resolve conflicts arising out of the application of the provision?

The General Counsel and amicus curiae AFL–CIO filed briefs in support of the General Counsel's motion; and amici curiae the Associated Builders and Contractors, Inc., LPA, Inc. and Society for Human Resource Management filed a joint brief in opposition.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The General Counsel proposes the retention of the existing 14-day requirement for making the records available but suggests that if the Board concludes that respondents will need additional time, the Board should be guided by Rule 34(b) of the Federal Rules of Civil Procedure, which requires production of documents in civil litigation no more than 30 days from the date of receipt of a written request. Rather than promulgate a hard and fast limit on the time for producing records, we shall retain the existing 14-day requirement but vest discretion in the Regional Director to extend the time upon request by a respondent and a showing of good cause.

Electronic copies of relevant records, where they already exist, are encompassed within the Board's traditional remedial language. *Bryant & Stratton Business Institute*, 327 NLRB 1135 fn. 3 (1999).

[4] This policy shall apply to all respondents, employers and unions alike.

urged to do by the General Counsel. Rather, we shall require that the place designated by the Regional Directors for production of records be a *reasonable* place, which could be the Regional offices of the Board, the respondents' facilities, or other designated location. If a respondent disagrees with the Regional Director's choice, the burden will be on the respondent to show that the production of records at the designated location is unduly burdensome. We shall also permit the Regional Directors to extend the time limit for production of records beyond the standard 14 days, for good cause shown.

Discussion

This amendment of the Board's standard backpay order is well within the Board's authority under the Act, will improve the administration of the Act, and is adequately justified based on the appropriateness of allocating costs to the wrongdoers and developments in records technology and management.

Section 10(c) of the Act, which grants the Board broad discretionary authority and which specifically authorizes the Board to order the payment of backpay, allows us to establish this remedial requirement, as a means of efficiently determining how much backpay is owed.[5] No party or amicus has contended otherwise.

We adopt this approach today because we believe that it will improve the administration of the Act, by promoting prompt, accurate, and full compliance with backpay orders by all respondents. There is a clear connection between the standard backpay order sought by the General Counsel and the effective vindication of employees' rights under the Act. Apart from generally improving remedial efficiency, amending the standard order will tend to discourage those respondents who might otherwise be inclined to withhold cooperation from the Board's agents, increasing the delay and expense of litigation. Moreover, this change furthers sound public policy favoring the imposition of the costs of compliance on the violator who is responsible for them, rather than on the general public. There is nothing punitive in allocating costs—which must be paid by someone—to the wrongdoer, whether or not he ultimately chooses to cooperate in remedying his wrong. Significantly, the change comes at a time when developments in record-keeping and document-reproduction technology, as well as the speed and ease of document delivery services, undeniably have made the production of records at a designated location a much simpler task than it was 50 years ago. As the General Counsel points out, the current "make records available" order provision arguably permits a respondent to direct a Board agent to a warehouse filled with boxes of undifferentiated documents and to prevent him from either using the respondent's photocopying equipment or removing the records for copying. There is no good reason to permit this possibility.

As requested by the General Counsel, we shall retain the current 14-day time limit for providing records. We established this time limit in 1996 to expedite compliance with Board orders, and it has proven generally to be a reasonable period.[6] Because we recognize, however, that the change we institute today could make that time limit unreasonably difficult to meet in cases that present unusual constraints, we shall grant discretion to the Regional Director to extend the time limit upon request by respondent and a showing of good cause.

Accordingly, in this and all subsequent backpay cases, we will order respondents to:

> Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

We caution that, in conferring on the Regional Directors the authority to designate a reasonable place for production of backpay-related records, we do not intend that the authority be exercised to invariably require records to be delivered to the Board's offices. The Board's cumulative experience under the Act shows that a high degree of compliance traditionally has been achieved through the cooperation of the majority of respondents who have voluntarily "made records available" at locations agreed upon in consultation with the Board's Regional offices. It is our expectation that these cooperative efforts between the respondents and regional offices will continue.

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[5] Sec. 11 of the Act grants the Board and its agents the power to subpoena any evidence "that relates to any matter . . . in question" and to require production of documents from "any place in the United States or any Territory or possession thereof, at any designated place." Because Congress contemplated that the Board would both order backpay and compel the production of documents, the scope of the Board's remedial authority under Sec. 10(c) must be understood to encompass the standard backpay order described here.

[6] See *Indian Hills Care Center*, 321 NLRB 144 (1996). The Respondent and amici curiae contend that the Board's failure to reallocate the burden of document production in backpay cases when it reviewed its remedial scheme in *Indian Hills*, affirmatively demonstrates that the Board did not intend to reallocate the burden. We reject this argument. In *Indian Hills*, the Board established, inter alia, a 14-day requirement for providing records in backpay cases. The issue of the location for production of records was not before the Board, as it is here.

Our purpose in this case is not to create an inflexible rule regarding the location for production of records, but rather to promote timely and effective compliance with Board orders.

Accordingly, in designating the location for production, we expect the Regional Director to be guided in the exercise of discretion by the need for prompt and successful compliance with backpay orders, rather than merely by administrative expediency. In exercising this discretion the Regional Director should consider all of the circumstances bearing on the issue, including at a minimum the respondent's cost and difficulty of producing records at a location other than the respondent's facility, and the difficulty and cost to the Regional office of reviewing the records at the respondent's facility compared to at its own office.[7] We intend the judicious exercise of discretion, rather than the establishment of an inflexible checklist of factors. Should the respondent disagree with the Regional Director's exercise of discretion in selecting the location for the production of backpay records, the burden will be on the respondent to demonstrate to the Regional Director why the production of such records at the designated location would be unduly burdensome.[8]

In reaching our decision, we have given careful consideration to the arguments of the parties and amici curiae regarding the necessity of amending our standard backpay order. By broadly authorizing the Board to order such remedies "as will effectuate the policies of [the] Act," in the words of Section 10(c), Congress encouraged the Board to draw upon its cumulative experience in fashioning remedies for unfair labor practices. We have done so in this case, drawing on both casehandling experience and policy grounds. Respondent and amici the Associated Builders and Contractors, Inc., LPA, Inc., and the Society for Human Resource Management (the Employer Amici) argue that empirical studies of respondent recalcitrance, as well as studies of the costs and cost-savings associated with the change in the standard backpay order, are a prerequisite to any change. We are unpersuaded. The cases cited by the Employer Amici are not to the contrary.[9] The lesson they impart is that an agency is not free to depart from existing precedent without explaining and justifying its departure. We have done so here, citing the relationship between the modified order and improved administration of the Act, the appropriateness of allocating costs to wrongdoers who create them, and developments in records technology and management.

The Employer Amici argue not only that costs to employers will increase, but that this increase is punitive in nature, violating the Supreme Court's holding in *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). We find no merit in this contention. To be sure, employers will have to bear costs that they would not incur if they complied with the Act. But whether they prove to be high or low—and we see no reason to speculate—they are in no sense comparable to a penalty. As we have explained, the primary purpose of requiring a violator to produce documents essential to the Board's calculation of backpay is to improve the efficiency of the backpay remedy. The costs allocated to violators (instead of being borne by the public) are entirely an incident of the remedy. In any case, we believe that Regional Directors will factor into their decision-making the relative costs of requiring production at one place or another.

Finally, the Employer Amici argue that rather than change language of the standard order for use in all backpay cases, the Board instead should use enforcement proceedings and its subpoena power to deal with recalcitrant respondents in particular cases.[10] While they are useful tools when efforts to obtain voluntary compliance have failed, the mechanisms cited by the Employer Amici are not a substitute for the standard order. The

[7] In appropriate circumstances, the Region may wish to consider asking the respondent to provide at the designated locations copies of the backpay records instead of the document originals, with the understanding that the Respondent would be expected to preserve the originals for review if the copies proved inadequate.

[8] We note that as respondents' use of and reliance on electronic payroll records becomes more and more prevalent, the amount of inconvenience that respondents might experience in providing payroll records at a location other than their facilities will further diminish. The effort to provide such records might involve no more than placing in the mail a computer disk containing the backpay information, or transmitting the records to the region via electronic mail.

[9] *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998); *Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 655 (D.C. Cir. 1992); *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1472 (D.C. Cir. 1987); *Oil, Chemical & Atomic Worker International Union v. NLRB*, 806 F.2d 269 (D.C. Cir. 1986).

[10] In support of this assertion, the amici curiae cite *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 510 (4th Cir. 1996). We find this case inapposite to the instant case. At issue there was the enforceability of prehearing subpoenas duces tecum and ad testificandum issued by the Board pursuant to Sec. 11(1) of the Act. The validity of the subpoenas in that case were challenged on several grounds not relevant to the issue presented here, i.e., the Board's authority to designate a location for the production of documents necessary to assure compliance with its remedial orders. *Cherokee Marine Terminal*, 287 NLRB 1080, 1082 (1988), also cited by the Respondent, is equally inapplicable. There the Board denied the General Counsel's request for the routine inclusion of a "visitatorial clause" in all its remedial orders to provide automatically for court-supervised discovery in compliance matters in court-enforced cases. In reaching that decision, the Board reaffirmed the appropriateness of "visitatorial-type clauses in specific remedial context," expressly including cases involving backpay liability.

aim of today's step is not simply to deal with cases of recalcitrance, but to avoid such difficulties (and the resulting delay and expense) in the first place.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ferguson Electric Co., Plainville, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. August 24, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale,	Member
Dennis P. Walsh	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Thomas E. Quigley, Esq., for the Acting General Counsel.
Dion Y. Kohler, Esq., for the Respondent.
Thomas M. Brockett, Esq., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on April 21–23 and May 21, 1998. Based on charges and amended charges filed on various dates commencing May 22, 1997, by individuals Greg Messier and Robert Gauvin, and by Local 90, IBEW, AFL–CIO (the Union), an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued October 17, 1997.[1] The consolidated complaint alleges that the Respondent, Ferguson Electric Co., Inc., interrogated and threatened employees in violation of Section 8(a)(1), and discriminatorily transferred two employees, terminated two other employees, and caused the constructive discharge of a third employee by changing his shift, in violation of Section 8(a)(1) and (3) of the Act. The Respondent filed an answer to the complaint denying the commission of any unfair labor practices and raising several affirmative defenses. The Respondent also denied that certain named individuals who occupied the position of foreman were its supervisors or agents within the meaning of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is an electrical contractor in the construction industry with an office and place of business in Plainville, Connecticut. The Respondent annually performs services valued in excess of $50,000 in States other than the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a nonunion, or merit-shop, contractor that the Union has been attempting to organize for several years. Although the Respondent has occasionally signed voluntary project agreements with various locals of the IBEW, it has not yet recognized nor executed a collective-bargaining agreement with the Union involved here. The allegations in the instant complaint concern the Union's attempt to organize the Respondent's employees in early 1997. The alleged unfair labor practices occurred at two projects on which the Respondent worked in Connecticut during that period, a museum being built by the Mashantucket Indians on their reservation in Ledyard, referred to in the record as the museum job, and work on several buildings at the Pfizer pharmaceutical plant in Groton.

Lee T. Ferguson is the president of the Respondent. Reporting to Ferguson are several Project Managers who are responsible for overseeing the financial aspects of individual projects, including dealing with the general contractor and other subcontractors, ordering material, scheduling labor and supervising the project foremen. Bruce Brown was the project manager for the museum job. Although he was also responsible for two other projects during the relevant time period, it is undisputed that he was resident on the museum job throughout this period. In addition to Brown, the Respondent also had a general foreman, Gary Heslin, at the museum job. Heslin was responsible for coordinating the work with the foremen and keeping track of changes in the specifications as the project progressed. Scott Duba was the project manager for the Pfizer job. Unlike Brown, Duba was not present on this job every day but visited the site from one to three times a week and maintained tele-

[1] All dates are in 1997 unless otherwise indicated.

phone contact with the project foreman on a daily basis. The Respondent did not have a general foreman on the Pfizer job, which was a much smaller job, employing fewer electricians, than the museum job. The Respondent admits that Ferguson, Brown, Heslin, and Duba are supervisors within the meaning of the Act.

In dispute is the status of four project foremen, i.e., Glenn Coughlin and Tom Reedy who worked at the museum and Bruce Jobmann and Charles Plungis who worked at different times as the sole foreman for the Pfizer job. The General Counsel contends that all four were statutory supervisors and that one of them, Plungis, violated Section 8(a)(1) of the Act by statements he made to employees. The General Counsel also seeks to impute knowledge the foremen had regarding the union activities of individual employees to the Respondent. The Respondent contends that none of the foremen were supervisors within the meaning of the Act.

On July 30, 1996, in response to an earlier attempt to organize the Respondent's employees, Lee Ferguson lawfully communicated his views on the question of union representation in a letter to the employees that contained several attachments. Significantly, the General Counsel does not allege that any statements contained in these materials violated the Act and I can discern nothing in this communication which transcends the permissible expression of opinion by an employer faced with a union organizing drive. Ferguson again communicated with his employees on March 13, in response to the Union's renewed effort to organize the Respondent's employees. In this letter, Ferguson explicitly stated his opposition to union representation of the Respondent's employees and described the disadvantages of union representation. Again, the General Counsel does not allege that any statements in this letter violated the Act. Although more forceful in its tone than the 1996 letter, the Respondent's expression of opposition to the Union contained in the 1997 letter is permissible under Section 8(c) of the Act. See *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990).

The General Counsel offered the testimony of former employee Max Rioual regarding a conversation that he had with Lee Ferguson in November 1996. Rioual testified that Ferguson interrogated him regarding his union activities, offered to get him into the Union and told Rioual that the Respondent would never go union. Although Rioual had not been identified by the Union as a "voluntary organizer" at the time of this conversation, Rioual had been soliciting employees to join the Union since August 1996. Rioual admitted on cross-examination that he had been complaining to a foreman about things he didn't like about the Respondent and that Ferguson referred to these complaints in the conversation. Because Ferguson did not testify in this proceeding, Rioual's testimony is uncontradicted. The General Counsel did not allege in the instant complaint that Ferguson violated the Act during this conversation.[2]

The General Counsel also offered testimony regarding comments Lee Ferguson made during a "State of the Business" address to employees in December 1997. Employee Daniel Petit testified that, at the beginning of the meeting, Ferguson thanked the employees for standing by him and said that the Respondent was the best merit shop company in the business. Ferguson then said that the Respondent was competitive with the Union and that the Respondent would never be union. Petit recalled, in response to a leading question, that Ferguson also told the employees that the Union had made a commitment to get him by the end of the year. Although Ferguson did not testify, Brown, the project manager, who was also present at this meeting, disputed Petit's testimony. Brown testified that Ferguson did not say anything about the Union during this speech and he specifically denied that Ferguson told the employees that he would never go union. General Counsel does not allege that Ferguson's comments regarding the Union at the December 1997 meeting were unlawful

Against this background, the General Counsel alleges that certain actions taken by the Respondent against several individual employees were motivated by those employees' union activities and support. The Respondent does not dispute that it took the actions alleged but contends that they were not motivated by anti-union animus but were based on legitimate business considerations. Before turning to the merits of these individual allegations, the alleged supervisory status of the project foremen must be resolved since their knowledge, statements and actions are crucial to the General Counsel's case.

A. Supervisory Status of Foremen

There is no dispute that the foremen do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge or reward employees. The evidence in the record clearly establishes that this authority resides with the project managers who hire employees, evaluate their performance, grant wage increases, decide the number of employees needed for a job, make decisions regarding transfers and shift assignments and lay off and discharge employees. To prove supervisory status, the General Counsel relies primarily upon the authority of the foremen to assign and direct the employees on their crew, to grant time off, to make recommendations regarding raises and to issue warnings. The General Counsel also relies on secondary indicia of supervisory status such as the difference in rate of pay, the color of the foremen's hardhat and the ratio of employees to supervisor.

Based on the testimony of witnesses for both the General Counsel and the Respondent, it appears that the primary responsibility of the foremen is to lay out the work, tell the electricians where they are to work on any given day and how the work should be done, and to oversee the performance of this work by the employees on their crew. The foremen spend very little, if any, time performing the work themselves. In laying out the work, the foremen follow the blueprints and specifications for the job and meet regularly with the project manager, and general foreman, if there is one. The foremen follow the

[2] This conversation was apparently the subject of a prior complaint which the Respondent settled in April 1997. That settlement agreement contained a nonadmission clause. At the hearing, I rejected the General Counsel's proffer of the agreement as evidence of antiunion animus on the basis of Rule 408 of the Federal Rules of Evidence and I reaffirm that ruling here.

direction of these admitted supervisors in making work assignments and directing the employees under them. There is no evidence that the foremen use any independent judgment in deciding what work is to be done and by whom.

The only evidence of discipline involving foremen are three written warnings signed by Coughlin given to employees on the museum job for leaving early or being late. The two warnings in evidence are also signed by Project Manager Brown and one of the employees who received a warning, Philip Michaud, testified that the general foreman, Heslin, was present when Coughlin gave him the warning.[3] Coughlin testified that he discussed these warnings with Brown and had Brown review the written warnings before they were given to the employees. The record also contains evidence that Plungis gave a warning to Petit while working on the Pfizer job because of a safety violation. It is clear, however, that this warning was issued at the direction of the project manager, Duba, in response to complaints from Pfizer and the general contractor. The record does not indicate what effect such warnings have on employees' status with the company and is silent as to what became of these warnings after they were issued. I find that these warnings do not reflect the exercise of independent judgment by Coughlin or Plungis.

The General Counsel also offered testimony that Plungis told employees on the Pfizer job that they had to show up for work on time, after certain employees came in late every morning, and on another occasion, told employees to stop congregating and talking in the hall. Greg Messier testified that he overheard Coughlin castigate an employee on the museum job regarding how he was hanging a backbox for a switchgear. These admonitions do not rise to the level of discipline and are not indicative of true supervisory authority. The General Counsel also offered evidence that Plungis recommended a raise for Reedy in 1995 and that Reedy in fact received a raise. The document in evidence reflecting that Reedy received a raise is not signed or initialed by Plungis and the record does not show whether Ferguson, who approved the increase, relied on Plungis recommendation in doing so. It is clear from other evidence in the record that the foremen can not themselves grant increases and that the project managers generally evaluate employees' performance independently and make the determination whether an increase is warranted.

It is undisputed that foremen collect, review, and initial timecards before turning them in to the office, but the timecards in evidence are also initialed by the project manager. Several of General Counsel's witnesses also claimed that they would ask the foreman if they needed to leave early and that the foreman would grant such requests without checking with anyone. Most of this testimony was lacking in specifics. Brian Wohlleben testified that it "was not a big deal" to ask for time off but, when he wanted to take vacation days, he had to fill out a form and submit it to the office through his foreman and that it was the project manager who approved the time off.

It is also undisputed that the foremen were paid at a considerably higher rate than the journeymen electricians who worked under them. The record reflects that all the foremen except Reedy wore white hardhats to differentiate them on the job from the journeymen and apprentices who wore blue hats and that Coughlin ate lunch and spent time in the office trailer with Brown and Heslin rather than with the employees. In contrast, Reedy wore a blue hardhat, ate with the employees, and generally aligned himself with the employees rather than management. Coughlin and Plungis also drove company trucks.

General Counsel's witnesses also testified that they perceived the foremen to be their supervisors and Plungis, at least, believed himself to be a supervisor. The record reveals that Plungis was in fact terminated in March over a "difference in management style." Brown testified that, on learning of the union activity at the museum job, he instructed at least one of the foremen, Coughlin, on "TIPS" to avoid committing an unfair labor practice. While this evidence might suggest that the Respondent held these individuals out as supervisors, that alone is insuffient to establish statutory authority. See *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991).

At the Pfizer job, in contrast to the museum job, the project foreman, at first Jobmann and later Plungis, were the only representative of the Respondent on site every day. While this might lead to an inference that they were supervisors, there is no evidence in the record that either Jobmann or Plungis exercised any real authority while they were on the job. Moreover, during a 2-week period after Jobmann left and before Plungis arrived, Wohlleben and Michaud were able to work alone without any on-site supervision. As experienced journeyman electricians, they did not need constant supervision and knew what had to be done. Significantly, when a second shift was required, or employees on this job requested a raise, the foreman did not make the decision, the project manager did.

It is well-established that the party asserting supervisory status has the burden of proof. *California Beverage Co.*, 283 NLRB 328 (1987); *Chicago Metallic Corp.*, 273 NLRB 1677 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986). Moreover, "the Board must judge whether the record proves that an alleged supervisor's role was other than routine communication of instructions between management and employees without the exercise of any significant discretion." *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). An individual who exercises some "supervisory authority" only in a routine, clerical, or perfunctory manner will not be found to be a supervisor. *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). Finally, the Board has recognized its duty not to construe the statutory definition too broadly because a finding of supervisory status would deny an individual rights as an employee that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981).

I find that the General Counsel has not met his burden here. As noted above, the few instances of discipline in the record do not reflect the exercise of any independent judgment by the foreman involved. Similarly, the foremen's authority with respect to timekeeping is merely a clerical function as there is no evidence that the foremen can affect employees' earnings or hours of work independently. The rather perfunctory grant of permission to leave early on a few occasions, in order to accommodate an employee's personal needs, does not reflect the exercise of any "genuine management prerogative." *Azusa*

[3] Brown testified that he gave this warning to Michaud.

Ranch Market, 321 NLRB 811 (1996). The most significant authority exercised by the Respondent's foremen is the assignment and direction of work. However, as noted above, this authority is circumscribed by the blueprints and specifications and the dictates of the general contractor or owner as communicated to the foreman by the project manager and/or general foreman. Thus, the assignment and direction of work is routine and does not require any independent judgment. *Aircraft Displays, Inc.*, 262 NLRB 1233, 1234–1235 (1982). See also *Electrical Specialties, Inc.*, 323 NLRB No. 122, slip op. at 3 (1997); *Windemuller Electric*, 306 NLRB 664, 667 (1992). Although the General Counsel relies on a number of secondary indicia of supervisory status, the Board has held that such evidence is not dispositive in the absence of evidence indicating the existence of at least one of the primary indicia. *Billows Electric Supply*, 311 NLRB 878 (1993). Accordingly, I find that Coughlin, Reedy, Jobmann, and Plungis were not supervisors within the meaning of Section 2(11) of the Act.

B. Alleged 8(a)(1) Violations

Robert Corraro, the Union's organizer, testified that he learned in January 1997 from the business manager of another local of the IBEW that some of the Respondent's employees who were working at the museum job had expressed interest in the Union. Based on this information, Corraro decided to hold a meeting of all the IBEW local unions in Connecticut and to invite the Respondent's employees. The meeting was scheduled for March 1 and Corraro prepared a notice with directions to the meeting location for distribution among the Respondent's employees. From the testimony of the General Counsel's witnesses, it appears that this notice was distributed at the museum job in mid-February, about 2 weeks before the meeting. Brown, the Respondent's project manager at the museum job, admitted being aware of the union meeting about 1–2 weeks before March 1 based on an invitation to the meeting he claims to have received by mail at his home.

Brian Wohlleben testified that, sometime after the notice about the union meeting was distributed on site, Brown called him into the office trailer over the radio. When he got into the office, Brown said: "I feel funny even asking you this. I hear there's a meeting coming up at the Union hall. What do the men think? Are they pro or con the Union?" According to Wohlleben, he replied that he really didn't know anything about it at the time, that he was just going to go to the meeting to find out information. Brown then allegedly asked about the union sympathies of a few employees by name, but Wohlleben could only recall one name at the hearing, Kevin Reilly. Wohlleben told Brown that he wouldn't speak for anyone else, but that he was going to attend the meeting to find out about a new career. Brown thanked Wohlleben for being honest and the conversation ended. On cross-examination, Wohlleben added that Brown told him that he heard a lot of talk among the men about the Union, that guys from Local 35 were asking for names and telephone numbers. Wohlleben admitted that he never told Brown his own feelings about the Union, indicating only an interest in learning more about it. Brown specifically denied calling Wohlleben into the office and asking him about union activity or the union sympathies of other employees, including Reilly. The General Counsel alleges that the Respondent, by Brown's questioning of Wohlleben, unlawfully interrogated employees about their own and their fellow employees' union sympathies.

Brown impressed me as a generally credible witness. Nevertheless, as to this aspect of the case, I found Wohlleben's testimony more believable. I note that Wohlleben was asked about this conversation three times. Although there were slight variations in his responses, he testified consistently regarding Brown's questioning. On the other hand, Brown did not testify in any detail because he denied the conversation ever occurred. I did observe during Brown's testimony a tendency to blush when answering questions about his knowledge of union activity and conversations with Wohlleben about the Union. This did not occur when he testified about the authority of foremen and the Respondent's reasons for taking personnel actions in dispute. On balance, I must credit Wohlleben and find that Brown did question him as alleged.

In *Rossmore House*, the Board held that "all the circumstances" must be examined in determining whether a supervisor's or agent's questioning of employees violates Section 8(a)(1) of the Act.[4] In the present case, there is no contention that Wohlleben was an open union supporter at the time of the questioning. In fact, Brown denied being aware of Wohlleben's union sympathies. Brown, as the project manager, was the highest ranking official of the Respondent on the museum job and had the power to grant wage increases, discharge or otherwise affect the employment status of employees. The questioning occurred in the office trailer after Wohlleben had been summoned by Brown. The questioning extended to soliciting information about the union sympathies of other employees. Although Wohlleben and Brown had been on friendly terms before this meeting, having worked together a number of years, this was not a casual conversation between friends.[5] Under all the circumstances, I find that Brown's questioning of Wohlleben in about mid-February was coercive within the meaning of the Act and violated Section 8(a)(1). *Hudson Neckwear, Inc.*, 302 NLRB 93,95 (1991); *Hanover Concrete Co.*, 241 NLRB 936 (1979).

The General Counsel alleges that the Respondent also violated Section 8(a)(1) through statements made by Plungis to Wohlleben and Michaud on two occasions at the Pfizer job. Because I have found that Plungis was not a statutory supervisor, his comments can be attributed to the Respondent only if he was acting as an agent of the Respondent when making these statements. The Board applies common-law principles when examining whether a nonsupervisory employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. The test is whether, under all the circumstances, employees "would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management." Under Sec-

[4] 269 NLRB 1166 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985).

[5] Brown in fact denied being friends with Wohlleben.

tion 2(13) of the Act, the question of whether specific acts performed were actually authorized or subsequently ratified should not be controlling when making agency determinations. *Southern Bag Corp., Ltd.*, 315 NLRB 725 (1994); *Great American Products*, 312 NLRB 962, 962–963 (1993), and cases cited therein.

There is no dispute that the Union informed the Respondent, by letter dated June 30, that Wohlleben and Michaud were union organizers. Wohlleben and Michaud testified that they hand-delivered the letter to Plungis on or about July 1. Plungis admitted seeing this letter. According to Michaud, he and Wohlleben began wearing Union T-shirts on the job at about that time. It is also undisputed that, sometime in July, Wohlleben and Michaud asked Plungis for a raise and that Plungis told them he had no authority to give them a raise, telling them that they would have to speak to Project Manager Duba. There is no dispute that Duba denied the request for a raise. General Counsel has not alleged that this denial was discriminatorily motivated. The record also reflects that both Wohlleben and Michaud had already received two wage increases within the preceding year. The complaint alleges that after Duba denied the request, Plungis made a comment which allegedly threatened employees with loss of wages and benefits because of their union activity.

According to Wohlleben, he spoke to Duba over the phone from Plungis office trailer, in the afternoon on a date he did not recall, and asked for a raise. Duba said no raises. When Wohlleben told him that there were other people on the job earning more money, Duba responded that it didn't matter what other people were making, he and Michaud were not getting a raise. Wohlleben testified that he hung up the phone and said to Plungis, "well, no raises" and that Plungis pointed to his union shirt and said, "maybe your shirt is part of the reason." Michaud's recollection was that he and Wohlleben had two telephone conversations in Plungis office trailer with Duba about a raise, with Wohlleben speaking to Duba in the morning and Michaud in the afternoon. According to Michaud, it was after Wohlleben's morning call that Plungis said, "more than likely, it had to be because of the shirts [they] were wearing." In a pretrial affidavit, Michaud stated that this comment was made after a telephone call in the afternoon.

In contrast to the General Counsel's witnesses, Plungis and Duba were consistent in recalling that it was Michaud who spoke to Duba on the phone about a raise and that the conversation occurred at the end of the day. Duba testified that he knew that Wohlleben and Michaud had received raises recently and he told them they would not get another raise. Plungis confirmed that this was the reason conveyed to him by Duba. Plungis denied telling Wohlleben and Michaud that their union shirts had anything to do with the denial of a wage increase.

Although I found above that Wohlleben was credible as to the interrogation by Brown, I was not as impressed with his credibility as to this allegation. Both he and Michaud exhibited a faulty recollection regarding who spoke to Duba and when about the raise. In addition, their testimony at the hearing was not entirely consistent with their pretrial affidavits. On the other hand, both Duba and Plungis impressed me as credible witnesses. I note further that Wohlleben admitted discussing with the Union's organizer his and Michaud's plan to ask for a raise, shortly after the letter identifying them as union organizers had been delivered. In light of the fact that each had already received two raises, this request for a third wage increase in a year strikes me as a set-up to an unfair labor practice charge. The comment allegedly made by Plungis would tend to bolster such a charge. The absence of any allegation that this raise was discriminatorily denied suggest that Duba's decision was a legitimate exercise of his managerial discretion. I thus conclude, after weighing all the evidence in the record, that Plungis' denial as to this statement is more believable and find that the comment was not made.[6]

The General Counsel further alleges that, on or about August 5, Plungis made another comment to Wohlleben which allegedly threatened employees with discharge because of their union activities. Wohlleben was the only witness to this alleged threat. According to Wohlleben, on the day after the meeting at which Duba told employees at the Pfizer job that they would have to work on a second shift, Plungis approached him and said that Lee Ferguson had been on site the day before and that Ferguson and Duba met with an attorney to discuss how to take care of the situation with Wohlleben and Michaud being on the job. According to Wohlleben, Plungis then said, "that's what second shift was all about." Wohlleben was asked about this conversation several times on direct, cross and redirect examination. Each time, his testimony reflected that Plungis' comments about what was discussed during this alleged meeting between Ferguson and the attorney were vague and ambiguous. The more he was asked about it, the more Wohlleben appeared to disavow any explicit mention of him and Michaud as the "situation" under discussion. In contrast, Wohlleben stated in his pretrial affidavit that Plungis told him that Duba and Ferguson "had conversations with a lawyer about how exactly to get rid of us and get around the situation." Again, Plungis denied this conversation occurred and Duba denied that any such meeting took place or that he told Plungis that the Respondent was exploring how to get rid of Wohlleben and Michaud. Other evidence in the record does establish that Duba and Ferguson were on site on August 4, the day before this alleged conversation, to meet with representatives of Pfizer and the general contractor over serious safety violations committed by the Respondent on that job. There is no evidence that an attorney was also present.

Although Wohlleben's pretrial affidavit records an explicit threat that the Respondent was attempting to get rid of him and Michaud because of their union activity, his testimony on the witness stand was not so clear. This conflict convinces me that his earlier statement was not an accurate representation of Plungis' comments about Duba's and Ferguson's visit to the

[6] Even were I to credit General Counsel's witnesses, I would not find that Plungis was an agent of the Respondent in making a comment which appeared to express no more than his speculative opinion as to the reason they were denied a raise. In this regard, General Counsel's witnesses acknowledge that a foreman like Plungis had no authority to act on such a request. The Respondent clearly had not placed Plungis in a position where Wohlleben and Michaud could reasonably believe that he was speaking on behalf of management and reflecting company policy when he made this comment.

Pfizer job on August 4. While Plungis may very well have told Wohlleben that Duba and Ferguson had a meeting the day before to discuss how to "get around' or "take care of the situation," it appears that Wohlleben merely assumed that the "situation" was the presence of two union organizers on the job. In actuality, the minutes of the August 4 meeting between the Respondent and Pfizer and the general contractor reveal that there were many problems on the job which the Respondent needed to "get around" or "take care of," which had nothing to do with Wohlleben and Michaud and the Union. In fact, because Wohlleben and Michaud engaged in little or no overt union organizing on the Pfizer job, the Union was the least of the Respondent's problems on August 4. Accordingly, I credit Plungis' denial and find that he did not tell Wohlleben that the Respondent was discussing or considering ways to get rid of Wohlleben and Michaud because of their union activity.

C. Alleged 8(a)(3) Violations

1. Termination of Greg Messier

Greg Messier testified that he was employed by the Respondent from December 3, 1996 until his termination on February 19. He specifically denied that he started working for the Respondent on November 11, 1996, the date indicated on his application for employment, even though his recollection was that he began work about 2 weeks after he filled out the application and the application is dated October 29, 1996. Messier offered no explanation for this discrepancy, leaving one to wonder why he insisted that he began his employment in December. The application does corroborate Messier's testimony that, when he was interviewed by project manager and admitted supervisor Joe Minoski, he was offered a job at the starting rate of $17 per hour with a review after 90 days for a "possible" $1 increase.

According to Messier, Minoski told him to report to the museum job to meet with Brown, the project manager. Messier recalled that he met with Brown on a Wednesday, at which time he claims to have been introduced to Coughlin as his "immediate supervisor" and told to start the following Monday, December 3. The calendar reveals that December 3, 1996 was a Tuesday whereas November 11 was a Monday. Messier was first assigned to work in the cup building, a utility building, where he worked for 3–4 weeks. From there he worked installing outlets in the main corridor connecting the cup building to the main museum building and finally ended up working in the main building, where he spent the remainder of his employment.

Messier testified that, while in the cup building, he worked alongside union members who were employed by McFee Electric, a unionized electrical subcontractor working on a different aspect of the job. Within a week of starting, Messier was approached by the McFee electricians and told that the Union was trying to organize the Respondent's employees. According to Messier, he expressed interest and asked for some literature about the Union. Messier testified that he thereafter became active in speaking to other employees of the Respondent about the Union. According to Messier, these conversations occurred in the trailer where the employees ate lunch. Messier claimed to be a member of a core group of employees, including Bob Gauvin, Wohlleben, and Michaud, who supported the Union during these conversations.[7] Tom Reedy was the only foreman who ate lunch with the employees in this trailer. Although Messier claimed that the Union was a common topic of conversation in January and February, he acknowledged that Reedy did not participate in these discussions.

Messier testified further that, in about January, he asked Reedy how he felt about the Union. Reedy replied that he didn't think the Respondent would ever become a union contractor. Messier claims that he also spoke to his foreman, Coughlin, about the Union 2 weeks before his termination. Messier testified that he asked Coughlin if he had heard that the Union was trying to organize the Respondent's employees. Coughlin responded that the Respondent had beat the Union before and would beat it again. According to Messier, this exchange occurred right after a conversation he had with a McFee employee, in the presence of Coughlin, about having a union meeting. Shortly before his termination, Messier saw the flyers about the March 1 union meeting being distributed in the lunch trailer, again with Reedy present. Messier admits that he told other employees in the trailer that he would not be able to attend the union meeting.

Messier testified that, the day before his termination, he asked Coughlin if his 90-day evaluation had been done. Coughlin told Messier that he had no problem with Messier's work but, if Messier wanted something in writing, he would have to speak to Brown. Later the same day, Messier spoke to Brown and asked if Brown had done his evaluation yet. Brown told Messier that he didn't have to do a formal evaluation, that they could just talk about it and that everyone was satisfied with Messier's work. Messier again asked for a written evaluation and asked about the wage increase he had been promised when hired. Brown asked how much Messier was currently making. When Messier told him $17, Brown said he was already making more than anyone else on the job and that the only way he could get more money was by taking on more responsibility and becoming a foreman. Messier admittedly became upset, telling Brown that he felt that he had been lied to when he was hired. According to Messier, Brown told him not to be upset and that he hoped Messier would continue to work as he had before. Messier denied telling Brown that he would probably look for another job.

Messier testified further that, the next day, early in the morning, Coughlin asked him if he reached any decisions. Puzzled, Messier told Coughlin that he thought Lee Ferguson made all the decisions. Coughlin then gave Messier his work assignment and he went to work. According to Messier, Coughlin returned a few hours later and told Messier to pick up his tools, that he was "all done working here." When Messier asked why, Coughlin said he didn't feel that Messier would continue to perform as he had in the past. Messier asked for a pink slip to take to unemployment and Coughlin told him to see Brown for that. When Messier asked Brown for a pink slip, he was told that one would be sent in the mail. The pink slip that Messier

[7] None of the other witnesses who testified for the General Counsel corroborated Messier's testimony regarding his union activism.

received 2 weeks later, dated March 4, 1997, cites "lack of productivity" as the reason for termination.[8]

Messier testified that neither Brown nor Coughlin, nor any other foreman, ever told him before he was terminated that they had a problem with his productivity. Messier also specifically denied being questioned or criticized about being out of his work area. When shown a written warning signed by Brown and the General Foreman, Heslin, which purports to reprimand him for such an offense, Messier denied ever seeing it. The warning is not signed by Messier, but contains a notation in Brown's handwriting that Messier "refused to sign saying that this is bullshit." According to Messier, the only comments he heard about his work before his termination were favorable. Messier testified that he was given more difficult and complex assignments and often assigned to work alone, because of his skills and experience.

Brown acknowledged that Messier had been told when hired that he would be evaluated after 90 days for a possible raise and he recalled Messier asking for a raise. However, according to Brown, this request was made in mid-January, not the day before Messier's termination. Brown testified that he told Messier that he felt his current rate was adequate for the work he was doing and that Messier became visibly upset and angry, accusing the Respondent of having lied to him. According to Brown, it was after this conversation that he began having problems with Messier. Brown acknowledged that Messier's performance of the work assigned to him was satisfactory, but his productivity was a problem because he began to disappear from the work area.

Brown identified three instances leading up to Messier's termination. The first occurred when Messier was working in the cup building.[9] According to Brown, he did not see Messier when he walked through his work area and was unable to reach him over the radio. Brown then radioed the foreman, Coughlin, and asked him where Messier was supposed to be working. When Coughlin confirmed that it was the cup building, Brown told Coughlin that Messier was not there and instructed Coughlin to find him, determine if he had a reason for being out of his assigned area and, if not, talk to him about being out it. According to Brown, Coughlin advised him at the end of the day that he had spoken to Messier about this incident. Brown testified that the second incident was the one that precipitated the disputed written warning in evidence, which is dated January 27.[10] Brown recalled that Messier was supposed to be installing conduit and lights in a retaining wall on the lower level of the main building. This assignment included some downtime, while waiting for the cement to be poured, during which Messier was supposed to be helping other electricians installing branch wire on level 1. Again, Brown observed Messier out of the area while walking through the site. Again, Brown tried to raise Messier over the radio without success and instructed Coughlin to find him. Brown testified that Coughlin was unable to find Messier for 1-½ to 2 hours. Messier allegedly told Coughlin that he had been looking for the carpenters. Upon receiving this report from Coughlin, Brown called Messier into the office and gave him the written reprimand. Brown testified that Messier became angry, refused to sign the warning, and again brought up the $1 raise he believed he had been promised. According to Brown, the third and final incident occurred on the day Messier was terminated. Again, Brown did not see Messier in the area he was supposed to be working, i.e., pulling branch wire on Level 1. This time, Brown went looking for Messier himself and found him on Level 4, in an area that the Respondent was not yet working. When Brown asked Messier what he was doing there, Messier turned red and said, "looking for materials." When Brown reminded Messier of their earlier conversation, Messier responded, "this is bullshit" and said he was going to look for another job. According to Brown, he said, "well, you don't have to, because as of right now, you are terminated." Brown testified that he made the decision on the spot without consulting anyone. Brown denied knowledge of Messier's interest in or activities on behalf of the Union and specifically denied that Reedy ever informed him of the union discussions taking place in the lunch trailer.

Coughlin testified in a less detailed manner than Brown and much of his testimony was elicited through leading questions. Nevertheless, he corroborated Brown's testimony that Messier was found out of his work area several times and that he spoke to Messier about this at the direction of Brown. Coughlin also denied knowledge of Messier's union activities or sympathies and specifically denied having the conversation about the Union described by Messier. Coughlin acknowledged that Messier was not the only electrician that he found standing around and further acknowledged that Messier was a good electrician. Coughlin denied that he made any recommendation to fire Messier and further denied asking Messier on February 19, the day he was terminated, whether he had made any decisions. The Respondent also offered evidence that it previously terminated another employee, Albert Baird, on November 7, 1996, for "lack of productivity, not at work station." Baird was terminated while a probationary employee.

In order to establish that Messier's termination violated Section 8(a)(3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that union activity was a motivating factor in the Respondent's decision to terminate him. To establish this prima facie case, the General Counsel must prove that the Respondent had knowledge of Messier's union activities or sympathies, had antiunion animus and took action against him because of this. Only if the General Counsel meets his prima facie burden does the burden shift to the Respondent to show that it would have taken the same action even in the absence of union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Because there seldom is direct evidence of unlawful motivation, the General Counsel may rely on circumstantial evidence from

[8] The pink slip also states that the length of Messier's employment was 3 months and 6 days, which is consistent with a November 11, 1996 starting date. This makes Messier's insistence that he began employment on December 3 even more mysterious.

[9] Because Messier worked in the cup building only in the first month of employment, this incident would have to have occurred before Messier asked for a raise.

[10] This incident would have occurred after Messier's request for a raise, if Brown's recollection of dates is accurate.

which an inference of discriminatory motive may be drawn. See *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). However, the totality of circumstances must show more than a mere suspicion that union activity was a motivating factor in the decision. *International Computaprint Corp.*, 261 NLRB 1106 (1982).

General Counsel has constructed his prima facie case on Messier's testimony indicating that the foremen, Reedy and Coughlin, knew of his union activities and sympathies and by circumstantial evidence suggesting that the Respondent's asserted reason for Messier's termination was pretextual. Because I have found above that the foremen are not statutory supervisors, any knowledge they had regarding Messier can not be imputed to the Respondent. Moreover, I do not credit Messier's testimony that he spoke to Coughlin about the Union after Coughlin allegedly witnessed him speaking to a McFee electrician about the union meeting. Messier's self-serving testimony about the extent of his union activism was not corroborated by any of the other employees who testified. Nor did the Union's organizer, Corraro, testify to any contact with Messier before his termination. Even assuming Messier participated in the discussions about the Union which took place in the trailer at lunch, only Reedy could have been aware of this and he did not testify.[11] Accordingly, I find that the General Counsel has failed to prove knowledge of Messier's union activities, an essential element of his prima facie case.

I further find that there is insufficient evidence of animus from which an inference of discriminatory motive might be drawn. The only independent violation of Section 8(a)(1) involved Brown's interrogation of Wohlleben that occurred around the time of Messier's termination, but was not directed at Messier. While other evidence in the record indicates that the Respondent was opposed to the unionization of its employees and preferred to operate as a merit shop contractor, and that the Respondent did not hesitate to communicate these views to its employees when faced with a union organizing drive, I do not ascribe any unlawful motivation to the Respondent's lawful expression of its views.

Finally, I do not find that the Respondent's asserted reason for terminating Messier was pretextual. While General Counsel has pointed out some minor inconsistencies in Brown's testimony regarding the sequence of events leading to Messier's termination, I am not persuaded that this means Brown was not being truthful about Messier's proclivity to be out of his work area. As I have noted above, Brown was an impressive witness, particularly when testifying about the three incidents when Messier was missing from his work area. By his own testimony, Messier spent a good deal of time talking to the McFee electricians about the Union and this may very well explain why he was absent from his own work area. I note further that Messier's testimony that he was not issued a radio every day was contradicted by General Counsel's other witness, Wohlleben, who credibly and candidly testified that "we all ha[d] radios". Finally, Messier's unexplained insistence that his employment by the Respondent began a month later than all the other evidence in the record would indicate, suggests that he was manipulating the dates in order to enhance his testimony in some fashion. It may have been an attempt to support his claim that he asked for an evaluation and raise the day before his termination, rather than in mid-January as Brown recalled. I thus find that Messier's denials that he was warned, or that any supervisor talked to him, about his absences from the work area are not credible. Accordingly, because the General Counsel has not proved that union activity was a motivating factor in Messier's termination, I shall recommend dismissal of this allegation of the complaint.

2. Termination of Robert Gauvin

The parties stipulated that Gauvin was hired September 23, 1996. It is undisputed that he was hired to work on a contract that the Respondent had at the Navy's submarine base in Groton, Connecticut. Because this work was covered by the Davis-Bacon Act, the Respondent's employees working on this job were paid substantially more than its employees working at the museum or Pfizer jobs. Gauvin testified that the foreman at the sub base, Kenny Ferguson, told him at the time he was offered the job that there was five years worth of work on this "rate" job. Within four months, however, Gauvin was transferred to the museum job and his rate was reduced accordingly. Gauvin acknowledged being upset about this transfer and admitted that he did not report to work for three days after his first day at the museum job. Gauvin testified that, on his third day absent, Brown called him at home and asked, "have I lost you?" Gauvin told Brown that he was upset about the cut in pay and relayed the "promise" Kenny Ferguson made about five years of rate work. Brown asked Gauvin to come back to work, telling him that he would give him a raise. Gauvin testified that when he returned to work, Brown showed him an evaluation in which Brown gave him the highest ratings possible on all categories and granted him a $1-hour raise. The parties stipulated that Gauvin received a $1 raise on January 21, based on a written review dated January 20. The review in evidence does not corroborate Gauvin's testimony regarding his ratings. In fact, he was rated in the middle in every category but attendance where he was rated below average. When shown this evaluation, Gauvin claimed that he did not see it at the time he got his raise, although his signature appears on the document.

Gauvin testified that he spoke to a McFee electrician with whom he had gone to high school about the benefits of union membership and that, about a week later, he was given flyers to hand out about the March 1 union meeting. Gauvin initially did not give a date for these events but testified, on cross-examination, that he was first approached about the Union when he started at the museum job and that he got the flyers

[11] I decline the General Counsel's suggestion that I draw an adverse inference against the Respondent from Reedy's failure to testify. The evidence in the record clearly demonstrates that Reedy had even less authority than the other three alleged supervisors and chose to align himself with the employees rather than management. Unlike the other foreman, he wore the same blue hardhat that employees wore and chose to eat and socialize with the rank and file employees rather than Brown, Heslin, and Coughlin. Under these circumstances, it can not reasonably be assumed that he would be favorably disposed to the Respondent rather than the General Counsel. Accordingly, an adverse inference shall not be drawn. See *Queen of the Valley Hospital*, 316 NLRB 721 (1995). Cf. *Grimmway Farms*, 314 NLRB 73 fn. 2 (1994).

during the week of January 17, i.e., the same week he was transferred to the museum job and was absent for 3 days. As noted above, other witnesses indicated that the notices regarding the union meeting were not distributed until mid-February. Gauvin claimed to have distributed these notices in the parking lot after work, urging his coworkers to attend the meeting. Gauvin testified that he also gave a flyer to Reedy who read it and returned it and that, on another occasion, when he was about to post one on the Respondent's gangbox on site, Reedy told him not to.

Gauvin testified that, on February 28, the day before the Union meeting, he handed out directions to the meeting to employees. Gauvin did this during breaks in the trailer where the employees and Reedy ate their lunch.[12] Gauvin testified further that he observed Heslin watching him as he gave verbal directions to two employees who approached him on his way back to work after lunch. Heslin said nothing to him at that time. According to Gauvin, at the end of the day, Heslin approached him while he was cleaning up his work area and told him to get his tools, that he was being laid off for lack of work. Gauvin encountered Reedy at the gangbox where he retrieved his tools. Gauvin testified that Reedy told him he was upset because usually he would know if someone on his crew was going to be laid off. Reedy allegedly said that he didn't know about Gauvin's layoff and that "it just didn't seem right." Gauvin then went to the office trailer and asked Heslin for a pink slip. Heslin told Gauvin that he would get one in the mail with his final paycheck. According to Gauvin, he received his check, but no pink slip. The parties stipulated that Gauvin was terminated February 28.

Gauvin denied that Brown ever spoke to him about his productivity and denied receiving any warnings or criticism about his work before he was laid off. Gauvin further denied ever leaving work early and denied that Brown or Heslin mentioned this in connection with his termination. According to Gauvin, he did not even see Brown when he was terminated. When shown his timesheet for his last week of work, Gauvin could not recall why he only worked 5 hours on February 27, the day before his termination. Gauvin testified that he would not leave work early without telling his foreman, i.e., Reedy. Gauvin appeared genuinely surprised by the questioning of the Respondent's counsel about his leaving early, which tends to support his claim that it was never mentioned to him before. Blanchette, a former employee of the Respondent who testified on rebuttal, recalled that he and Gauvin left early on February 27 because of Blanchette's child care responsibilities. Because Gauvin carpooled with Blanchette, he had to leave when Blanchette left. Blanchette further testified that he cleared it with his foreman, Coughlin, and that Coughlin told Blanchette, "make sure Bob [Gauvin] okays it with Tom Reedy." There is no evidence in the record whether Gauvin in fact "okayed" it with Reedy. Blanchette received no discipline for leaving work early on February 27, although he had received a warning from Coughlin on February 10 for repeatedly leaving his work area before 3:30 p.m.[13]

Heslin, an admitted supervisor, did not testify. Instead, Brown testified regarding Gauvin's termination. Brown testified that he hired Gauvin for the job at the sub-base and that he explained to Gauvin that he would have a base rate of $16/hour which would be used when not on a prevailing rate job. Brown, who was the project manager for the sub-base job, denied making any guarantees to Gauvin that he would remain on the sub-base for any length of time. Brown further testified that Gauvin was transferred to the museum job with three other employees, including Blanchette, as one phase of the job was being completed. Brown admitted speaking to Gauvin about his absences when he was first transferred, but insisted that he spoke to Gauvin on site on January 17, not by telephone while Gauvin was home. According to Brown, Gauvin told him that he was having financial problems and the transfer from the rate job hurt him in the pocket. Brown told Gauvin he would try to help him out. He prepared the evaluation, reviewed it with Gauvin and told him he would give him a $1 raise. Brown testified that Gauvin expressed disappointment, claiming that he had been promised rate work for 4 years. Brown told Gauvin that he had never made this promise and that he thought he was being fair by giving him the raise. According to Brown, Gauvin said, "I'll keep that in mind."

Brown testified that he observed Gauvin's performance after the January 20 evaluation and that Gauvin was not pulling his weight on the job.[14] According to Brown, Gauvin, Blanchette and Wohlleben were doing the same work, roughing in offices. While Blanchette and Wohlleben would complete four or finve offices a day, Gauvin had trouble completing more than two. Brown testified that he discussed this with Gauvin several times, asking him to pick up the pace, and that Gauvin again brought up the "promise" of rate work for four years. Brown testified that he also spoke to Gauvin on a couple occasions about leaving work early without notifying anyone. Unlike Blanchette, however, Gauvin was never given a written reprimand for this. Brown testifies that he terminated Gauvin on February 28 because he needed to cut the crew at that time. In addition to laying off Gauvin, Brown transferred four employees to other jobs.[15] Brown chose to terminate Gauvin because of his lack of productivity. According to Brown, he personally told Gauvin that he was being terminated. Brown denied knowledge of Gauvin's union activities and sympathies and specifically denied receiving any reports from Heslin or Reedy about the activity they allegedly observed.

[12] Gauvin's testimony regarding his union activities was corroborated by Blanchette, Michaud, and Wohlleben.

[13] Blanchette apparently came forward as a witness after Gauvin asked him, during the hiatus in the hearing, if he remembered leaving early on February 27. I have taken this apparent violation of the sequestration order into account in considering the credibility issues raised by Gauvin's termination.

[14] Although Brown was also the project manager at the sub-base and hired Gauvin away from another contractor, he claimed that he did not have any occasion to observe Gauvin's performance before he gave him the evaluation which led to the January 21 raise.

[15] Two of these transfers are the subject of complaint allegations and will be discussed, infra.

On cross-examination by the General Counsel, Brown raised for the first time the issue of Gauvin leaving early on February 27. Brown claimed that this was "the straw that broke the camel's back, as far as I was concerned." Brown related that he personally observed Gauvin leaving work on February 27 and that he saw no one else leaving with him. Although Brown noted on Gauvin's timesheet that he left early, he made no similar note on Blanchette's timesheet even though it reflects that he also left early the same day. Brown acknowledged that he never spoke to Gauvin about this incident before he terminated him. On a Company "Termination Form" filled out and signed by Brown on March 2, Brown identified the reason for termination as: "Lack of productivity. Leaving work early on several occasions without notification as per handbook requirements."

Applying the Board's *Wright Line* test to the evidence regarding Gauvin's termination, I find that the General Counsel has established a prima facie case of discriminatory motive. The General Counsel has proved, through the testimony of Gauvin as corroborated by three other witnesses, that Gauvin was engaged in union activity prior to his termination. While the evidence suggesting that Foreman Reedy was aware of Gauvin's union activities may not be imputed to the Respondent for the reasons noted above, General Counsel offered other evidence from which knowledge may be inferred. Gauvin's testimony that admitted Supervisor Heslin observed him giving directions to the Union meeting to two employees on the same day that Heslin later informed Gauvin he was being laid off was not contradicted. Although I declined to draw an adverse inference from the failure of Respondent to call Reedy as a witness, an adverse inference is appropriate as to Heslin's failure to testify. As the admitted supervisor who is alleged to have terminated Gauvin, it may reasonably be assumed that he would be favorably disposed toward the Respondent. Because the Respondent offered no explanation for his absence as a witness, I must infer that his testimony would not have been helpful to the Respondent's case had he appeared. *Queen of the Valley Hospital*, supra. I thus find, based on Gauvin's uncontradicted testimony that Heslin in fact observed him engaged in union activity on February 28. I further find that Gauvin was told that same day that he was being laid off for lack of work.

In addition to the unlawful interrogation of Wohlleben found above, animus may be inferred with respect to Gauvin's termination from its timing and circumstances.[16] The record establishes that the Respondent was generally aware of the Union's renewed efforts to organize its employees. Brown admitted knowledge of the planned March 1 union meeting and admitted distributing a list of "Questions to Answer Before You Sign a Union authorization Card," which he had received from the Respondent's main office, to employees at the museum site the day Gauvin was terminated. Heslin had observed Gauvin giving employees directions to this meeting. His abrupt termination the same day, assertedly for "lack of work," without either a final check or pink slip being prepared, suggests this was not the real reason for termination.[17]

Respondent, while not calling Heslin to contradict Gauvin, relied on Brown to dispute Gauvin's testimony that lack of work was the reason he was given for his termination. I credit Gauvin's testimony that he did not even see Brown when he was terminated. While I found Brown generally credible and specifically credited him as to Messier's termination, I found his testimony regarding the reason's for Gauvin's termination less credible.[18] I note that there is no evidence in the record to corroborate Brown's testimony that Gauvin was warned about leaving work early before the last incident on February 27. This omission is in stark contrast to the documentation which does exists as to other employees, i.e., Blanchette and Michaud, who received written reprimands for this offense. Brown's testimony that Reedy was a "softie" does not explain this difference in documentation because Brown claimed that he was the one who warned Gauvin on a couple occasions and he is the same supervisor who signed the written warnings issued to Blanchette and Michaud. I find from this lack of documentation that Gauvin received no such warnings, verbal or written before his termination. I note further that only Gauvin was allegedly terminated for leaving work early on February 27 despite the fact that Respondent's records show that Blanchette left at the same time and Blanchette already had a written warning in his file for leaving early. The Respondent did not attempt to explain this disparate treatment. Although Brown claimed that he only saw Gauvin leave early that day, Blanchette testified credibly that he and Gauvin left together, and the timesheets reflect this.[19]

In light of the dubious credibility of Brown's testimony regarding Gauvin's leaving work early, I find that his other asserted reason, "lack of productivity," is nothing more than a make-weight argument to bolster a weak case. Brown hired Gauvin from a competitor to work at the sub-base and gave him a $1-hour raise about a month before terminating Gauvin for poor productivity. His claim that he did not have an opportunity to observe Gauvin's performance until after he gave him the raise is unbelievable. Considering how quick Brown was to terminate other employees, such as Baird and Messier, for productivity problems, it is unlikely that Gauvin would have escaped his scrutiny for 4 months if he was in fact unproductive. In light of Brown's testimony that he needed to reduce the size

[16] The Board has also held that the same circumstances can support an inference of knowledge and antiunion animus. See *Abbey's Transportation Services*, supra.

[17] Although Messier was also abruptly terminated before similar documentation was prepared, this is understandable because his termination was for cause, i.e., being found out of his work area for the third time without explanation, after having been warned about this conduct. Brown made the decision to fire Messier on the spot. A lay off for lack of work ordinarily would not occur so suddenly, affording time for the Respondent to have prepared Gauvin's final check and pink slip. The fact Gauvin never received a pink slip further supports the pretextual nature of the reason he was given by Heslin.

[18] It has long been recognized that a witness may be credible as to some parts of his testimony without being credited as to his entire testimony.

[19] Although Blanchette's testimony about this incident was elicited after he had spoken to Gauvin in violation of the sequestration order, I will not discredit his testimony because other evidence in the record, including the Respondent's timesheets, corroborate Blanchette.

of the crew at the museum job on February 28, Gauvin's testimony that lack of work and not lack of productivity was the reason he was given for his termination is more credible. Brown's unsuccessful attempt to establish a different cause for Gauvin's termination leads me to the conclusion that the Respondent was attempting to conceal it's true motive, i.e., an unlawful one. *Shattuck Den Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Because the General Counsel met his burden of proving a prima facie case that Gauvin's discharge was discriminatorily motivated, the burden was on the Respondent to establish that Gauvin would have been terminated on February 28 in the absence of union activity. By failing to call Heslin and by relying upon pretextual reasons for the termination, Respondent has failed to meet its burden. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) when it terminated Gauvin on February 28.

3. Transfer of Wohlleben and Michaud to Pfizer

Wohlleben was employed by the Respondent for a number of years before the events at issue here. There is no dispute that he was well-regarded by the Respondent, being considered a good electrician. Wohlleben testified that he worked at the museum job from November 1995 until he was transferred to Pfizer on February 28, the day before the union meeting. Wohlleben was approached in February by the McFee electricians about joining the Union and became involved in distributing flyers about the Union's March 1 meeting and discussing the union during the lunch time conversations in the trailer, with Reedy present. Brown's unlawful interrogation of Wohlleben in mid-February has been described above. As noted, Wohlleben did not tell Brown that he supported the Union, indicating instead that he was going to the meeting to get more information.

It is undisputed that Wohlleben and Coughlin had been good friends and socialized together outside work, although that relationship apparently ended after the events involved here. Wohlleben testified that he had a conversation with Coughlin in the summer 1996, about the time that the Respondent's president sent the employees a letter about the Union's earlier organizing effort. Wohlleben asked Coughlin, who was a foreman at the time, what "the deal was with the Union." Coughlin responded that "Ferguson won't go Union so it's a dead issue." Wohlleben testified that he also spoke to Brown about Ferguson's letter around the same time and that Brown told him that the Respondent would never go union. On cross-examination, Wohlleben recalled that Brown indicated that the Respondent did not want to be a union contractor and Brown described his brother's experiences as a union member to convey to Wohlleben the disadvantages of joining the Union. Wohlleben did not tell either Coughlin or Brown in 1996 that he was interested in joining the Union.

According to Wohlleben, Coughlin called him at home about a week after his interrogation by Brown and asked Wohlleben "what's the deal with the Union?" Wohlleben told Coughlin that a lot of the guys were unhappy, especially those on Coughlin's crew. Wohlleben recalled that this conversation occurred the evening of February 27, after Brown held a meeting on site and urged the employees to go to the union meeting on March 1 with an open mind. According to Wohlleben, he spoke up during this meeting and questioned Brown about a contract for additional work on a hotel at the Indian reservation that the Respondent had bid on. Brown responded that the Respondent would not be getting that job and Heslin added that there was not much work in that bid anyway. Wohlleben then disputed Heslin's statement. Wohlleben was the only employee to speak up at this meeting. The next day, February 28, General Foreman Heslin told Wohlleben that he was being transferred to the Pfizer job because they had a lot of overtime over there and that he didn't know how long Wohlleben would be there. Michaud was transferred at the same time.

Wohlleben testified that, when he arrived home that night, his wife told him that he had almost been fired that day. She apparently learned this through a conversation she had with Coughlin's wife. Based on this report, Wohlleben called Coughlin and Coughlin allegedly told Wohlleben that Brown was going to fire him because of his involvement in the Union, but Coughlin convinced Brown to transfer him instead. Wohlleben testified further that Coughlin told him that Brown was going to transfer him to Massachusetts, but that Coughlin told Brown that Wohlleben would quit rather than go to Massachusetts and, as a result, Brown decided to transfer him to Pfizer. According to Wohlleben, Coughlin also told him in this telephone conversation that Brown asked Coughlin who else he wanted off the [museum] job and Coughlin told him Michaud.[20]

Wohlleben testified that he attended the Union meeting on March 1 and reported to work at the Pfizer job on Monday, March 3. Jobmann was the foreman at the time. According to Wohlleben, Jobmann was surprised to see him and Michaud, telling them that he had been asking for help for 3 weeks. Wohlleben acknowledged that a third employee started on the Pfizer job the same day. A couple weeks later, according to Wohlleben, Jobmann told him and Michaud that he found out why they were sent to his job, that it was because they went to the union meeting.

Michaud's testimony generally corroborated that of Wohlleben. Michaud had been hired by the Respondent in July 1996, upon a referral by Wohlleben. Michaud testified that he also had conversations with Coughlin and Reedy after receiving Lee Ferguson's July 1996 letter about the Union. Although Michaud asked each of the foremen what was going on with the Union, he recalled that neither had much to say about it. In February, Michaud gave his name and number to one of the McFee electricians and also distributed the flyers about the union meeting and expressed his interest in going during the lunch breaks in the trailer, with Reedy present. According to Michaud, Coughlin asked him about a week or two before the union meeting if he was going. Michaud told Coughlin that he was going in order to get more information if there was a vote. Michaud asked Coughlin if he was going and Coughlin did not respond. Michaud corroborated Wohlleben regarding the meeting Brown held on February 27, including Wohlleben's testi-

[20] Although the General Counsel alleged that Coughlin was a supervisor, he did not allege that these statements allegedly made by Coughlin, indicating a discriminatory reason for the Respondent's actions, violated Sec. 8(a)(1) of the Act.

mony that he asked about the hotel job. Michaud recalled, contrary to Wohlleben, that Brown handed out the list of questions to ask before signing a card at this meeting. Wohlleben had testified that the employees were instructed to pick this up at the trailer on their way home on Friday night, February 28. With respect to the transfer, Michaud recalled that he was told by Heslin on February 28 that he was going to Pfizer, "probably for good." Finally, Michaud corroborated Wohlleben's testimony about Jobmann's statement as to the reason they were transferred.[21]

Coughlin specifically denied having any discussion with Wohlleben about the Union, either in 1996 or 1997. Coughlin claimed that he first learned of Wohlleben's interest in the Union from the June 30 letter sent by the Union to the Respondent identifying Wohlleben and Michaud as voluntary union organizers. Coughlin also specifically denied having the telephone conversation with Wohlleben on February 28 in which he allegedly told Wohlleben that the Respondent wanted to fire him for his union activities. Coughlin further denied having any discussion with Brown about terminating or transferring Wohlleben. According to Coughlin, he first learned of the transfers on Friday morning from Heslin after Brown returned from the weekly project manager's meeting at the Respondent's main office.

Brown also denied being aware of Michaud's or Wohlleben's interest in the Union and denied specific knowledge of their union activity. He denied further that he had any conversation with Wohlleben in 1996 about Lee Ferguson's letter regarding the union campaign. According to Brown, he transferred Michaud and Wohlleben on February 28 because he had a need to reduce the crew at the museum job at that time. Two other employees, Elizabeth Salzell and Richard Wade, were transferred on the same date to a supermarket construction job that the Respondent had recently begun in So. Hadley, Massachusetts. That job was 1¼ to 1½ hours away from the museum job whereas the Pfizer job was 15 minutes away. According to Brown, he learned from Scott Duba, the project manager for the Pfizer job, that the Respondent needed electricians on that job during the regular weekly project manager's meeting that Friday morning. One of the purposes of these meetings is to discuss staffing needs at the various projects on which the Respondent was working. Brown testified that he told Duba that he could provide the men that Duba needed. Duba corroborated Brown in this regard. Brown further testified that no new employees were added to the museum job to replace the four who were transferred out on February 28. Brown also denied having any conversation with Coughlin in which he indicated a desire to fire Wohlleben because of his union activities.

Jobmann did not testify but Duba denied telling him that union activity had anything to do with the transfer. Jobmann left the Respondent's employ in about June. I have already found above that Jobmann was not a supervisor within the meaning of the Act. Because he was no longer employed by the Respondent at the time of the hearing, he was equally available to either party. Therefore, I shall draw no adverse inference from his failure to testify.

To prove his prima facie case, the General Counsel relies in part on the same evidence regarding Reedy's and Coughlin's knowledge of Wohlleben's and Michaud's union activities and sympathies which I have found above may not be imputed to the Respondent. Moreover, even assuming that Wohlleben expressed his union views to his friend Coughlin, there is no evidence that Coughlin communicated this information to the Respondent. I have already found above that Brown questioned Wohlleben about the union's support among his fellow employees, but Wohlleben never told Brown during that conversation that he himself was in favor of the Union. Because Wohlleben was a long-term and apparently trusted employee of the Respondent, Brown may have believed that he could gauge the extent of the Union's support among the employees through this interrogation of Wohlleben. This does not necessarily mean that Brown knew that Wohlleben was a union supporter.

I do not attach much weight to Wohlleben's testimony about his conversation with Coughlin the evening of February 28.[22] I note, initially, that Coughlin is not a supervisor of the Respondent and any statements he made to Wohlleben would be hearsay. Moreover, although Coughlin had some limited nonsupervisory authority over employees on his crew, for example, with regard to the assignment and direction of work and enforcement of attendance rules, there is no evidence that he or any other foreman had any role in decisions regarding transfers. Thus, Wohlleben could not reasonably have believed that Coughlin was speaking as an agent of the Respondent when describing his efforts to "save Wohlleben's job." On the contrary, assuming this conversation occurred as Wohlleben described it, it is obvious that Coughlin was speaking to Wohlleben as a friend in an effort to convince Wohlleben what a true friend he was, having gone out on a limb to save his job. In any event, I do not believe that this conversation in fact occurred as described by Wohlleben because it makes no sense. If Wohlleben's version of Coughlin's statements is correct, Brown would have agreed to transfer Wohlleben to a job only 15 minutes away, in order to prevent him from quitting, right after telling Coughlin that he wanted to fire Wohlleben. If he wanted to fire Wohlleben because of his involvement with the Union, why would Brown care if transferring Wohlleben to Massachusetts might cause him to quit?! Accordingly, this conversation, assuming it occurred, does not establish a discriminatory motive for the transfer.

The same is true with respect to the testimony of Michaud and Wohlleben that Jobmann told them a few weeks after the transfer that he had found out that they were transferred because they went to the union meeting. Jobmann was neither a supervisor nor agent of the Respondent in making this gratuitous remark. Moreover, because Wohlleben and Michaud did not go to the union meeting until after they were transferred, this could not have been the reason for the transfer. Thus, even

[21] Although the General Counsel alleged that Jobmann was a supervisor, this statement was also not alleged to have violated Sec. 8(a)(1).

[22] Apparently, because it was not alleged as an independent violation of Sec. 8(a)(1), the General Counsel did not ascribe much weight to it as well.

if Jobmann made this remark, it does not establish a discriminatory motive for the transfer.

Assuming arguendo that the General Counsel has established knowledge of Wohlleben's and Michaud's union activities and sympathies, he still has not proved that the transfer was discriminatory. Wohlleben and Michaud were not the only employees transferred off the museum job that day and the others, who apparently were not known to be union supporters, were sent much further away. There is no showing that Wohlleben or Michaud suffered a loss in pay or other benefits by changing jobsites. Evidence in the record reveals that such transfers are not uncommon, with many of the General Counsel's witnesses having been transferred from job to job to meet the Respondent's staffing needs before any involvement in the Union. I note further that the General Counsel did not attempt to contradict Brown's testimony that there was a business need to reduce the crew size at the museum job and to increase the crew at Pfizer at the time he transferred Wohlleben and Michaud. Accordingly, I find that the General Counsel did not meet it's burden of proof with respect to this allegation. Assuming that a prima facie case was established, I would find that the Respondent met its burden by showing that Wohlleben and Michaud would have been transferred even in the absence of union activity based on the undisputed evidence that this action was taken as part of a routine shifting of personnel to meet the manpower requirements of the respective jobs.

4. Wohlleben's Reassignment to Second Shift and Alleged Constructive Discharge.

As noted above, on or about July 1, the Union notified the Respondent by letter that Wohlleben and Michaud were organizing the Respondent's employees on behalf of the Union. Wohlleben testified that the day after handing a copy of this letter to Plungis, Plungis asked him and Michaud if they would be leaving anytime soon and if they were going to give any notice before leaving. Wohlleben told Plungis that he didn't know. Wohlleben testified that, prior to this time, other employees who had been "busted out" by the Union, i.e., identified by the Union as organizers, had left the Respondent to take jobs with union contractors. Wohlleben candidly admitted that he wanted to get a job with a union contractor and that he hoped to follow the same route the other voluntary organizers had followed. Wohlleben admitted that, other than handing out some literature he received from the Union, he did not engage in any organizing activity on the Pfizer job. The Union's organizer, Corraro, testified that Wohlleben and Michaud did not make a commitment to the Union until late June, shortly before he wrote the letter to Respondent.

Wohlleben's and Michaud's request for a raise in July has already been described above. On August 4, Duba held a meeting with Michaud, Wohlleben, Blanchette, and an apprentice, Jason Wolfart. Plungis was also present. Duba told the employees that the job was going to second shift starting Wednesday August 6 because they had a lot of work to do in the corridors that were occupied by Pfizer employees during the daytime. According to Wohlleben, Duba said that the employees could either go on second shift or find something else to do. Wohlleben told Duba that he could not go on second shift because his wife worked at night and he had to stay home with his daughter. Wohlleben asked to be sent to another job on first shift. Duba responded that Wohlleben had been transferred to that job and he either had to work that job second shift or find something else to do. Wohlleben protested that this was unfair and Duba said he was not going to debate it. Wohlleben then said, if Duba would not permit him to work first shift, he wanted a pink slip. Duba replied that he was not giving out pink slips, that Wohlleben would just have to find something else to do. Wohlleben acknowledged on cross-examination that Duba told the employees that second shift would be temporary for a couple of weeks.

Michaud testified that he also told Duba at the August 4 meeting that he could not go on second shift, saying that he had already tried it on a voluntary basis and it didn't work out. Michaud corroborated Wohlleben's testimony as to the reason Wohlleben gave for being unable to work a second shift and corroborated Wohlleben regarding Duba's response. In contrast to Wohlleben, Michaud did not recall Duba explaining why the employees had to go on second shift. Curiously, although Michaud also refused to work second shift, claiming family obligations, and was told the same thing as Wohlleben, the General Counsel has not alleged that his reassignment to second shift and subsequent resignation from employment violated the Act.

Wohlleben testified that, as the employees were leaving work after the meeting, he and Michaud encountered Earl Goodell, another employee of the Respondent who had been working primarily on another part of the Pfizer job. According to Wohlleben, Goodell asked them what the meeting was about. When Wohlleben told Goodell that the job was going second shift, Goodell said, "well, that's funny, because I'm the new foreman for first shift." Later in his testimony, Wohlleben changed his testimony and recalled that Goodell said he was going to be "running first shift." Both of these versions were inconsistent with his pretrial affidavit, in which Wohlleben stated that Goodell said he would be "working" first shift. Michaud, who was present during this conversation, testified that Goodell said he was coming over to building 274, where Michaud and Wohlleben had been working, to "take over first shift." There is no dispute that Goodell had been working primarily in another building on the Pfizer site under a different contract that the Respondent had. There is also no dispute that Goodell had occasionally helped out on the part of the job where Michaud and Wohlleben were working before this meeting.

Wohlleben testified further that, the next day, he and Michaud telephoned Duba from Plungis' office.[23] Wohlleben recalled that it was Michaud who did the talking. According to Wohlleben, Michaud asked Duba on August 5 if there was any first shift work available. Duba told them there was not. At that point, Michaud told Duba that he could send them their pink slips in the mail. They then turned in their hardhats and safety

[23] This is the same day on which Plungis allegedly made the statement about Ferguson meeting with an attorney to find a way to get rid of Wohlleben and Michaud. I have already discredited Wohlleben's version of this conversation in dismissing that allegation of the Complaint.

glasses, shook Plungis' hand and left the job. Michaud corroborated Wohlleben regarding the telephone conversation with Duba and their resignation. Wohlleben admitted that he started working for Rizzo Electric the next day and that the Union got him this job. According to Wohlleben, the Respondent was aware, before the August 4 meeting, that he could not work second shift because he had previously turned down a request from Jobmann to work second shift on a voluntary basis, citing the same reason. Wohlleben did not know whether Duba or Plungis were aware of this incident.

The General Counsel also offered the testimony of Dan Petit, a current employee of the Respondent who was working at the Pfizer job in July and early August. According to Petit, he declined a request from Plungis to work second shift on a voluntary basis and that, thereafter, the Respondent transferred him to a first shift job at Bayer in West Haven, Connecticut. On cross-examination, it was established that Plungis' request was made at the end of July during the period when the Respondent was attempting to staff second shift on a voluntary basis. Petit's timesheet in evidence shows that he last worked at Pfizer on August 4 and started at Bayer on August 5. His timesheet also shows that, even before August 4, he had not worked exclusively at the Pfizer job. Finally, the Respondent established that Petit's transfer to Bayer was in response to complaints from Pfizer and the general contractor, Zlotnick Construction, Inc., because of a serious safety violation committed by Petit and was not because of his unwillingness to work second shift.

Duba testified that the Respondent made the decision to start a mandatory second shift in response to demands from Pfizer and Zlotnick. Building 274 was an active animal research facility and the work that the Respondent and other contractors were doing was interfering with the work of Pfizer's employees. In addition, Petit's safety violation had resulted in a power outage which jeopardized Pfizer's ongoing research. The decision to go to a mandatory second shift was made after efforts to seek volunteers had been unsuccessful. Duba admitted that Wohlleben told him at the August 4 meeting that he could not work second shift because of child care responsibilities and that he told Wohlleben and Michaud that second shift was mandatory, that it was not open to debate. According to Duba, Wohlleben and Michaud said that they would show up for work at 7 a.m. and if there was no work, the Respondent should give them a pink slip. When Duba asked Michaud what the pink slip should say, i.e., as a reason for termination, Michaud said he didn't give a —— what it said. Duba recalled that Michaud told Wohlleben not to worry, that he would take care of it. Duba confirmed that Michaud telephoned him on the afternoon of August 5 and asked if there was any first shift work for him and Wohlleben and that he told them there was not.

Duba and Plungis testified that Goodell's job, working on a different contract with a different general contractor, required a day shift and that he remained on first shift to perform that contract, occasionally filling in at Building 274 if anything needed to be done during the day. Goodell was eventually transferred to the Museum job on August 18 because of another safety incident at Building 274. An August 15 "Notice of Safety Violation" from Zlotnick to the Respondent in fact bars Goodell from the Pfizer job. Duba explained that he did not transfer Wohlleben to a first shift job elsewhere because if he had, other employees would make similar requests for special consideration, citing family concerns, and he would be left with no one to work second shift. According to Duba, the second shift at Pfizer lasted no more than 4 weeks. Plungis recalled that it lasted more like a month or two, but Blanchette, who testified for the General Counsel recalled that it was only a couple weeks.

General Counsel, in his brief, concedes that the Respondent had a legitimate business reason for starting a mandatory second shift but argues that the Respondent was discriminatorily motivated in refusing Wohlleben's request to stay on first shift, either at Pfizer or at another job. The General counsel's prima facie case of discriminatory motive rests on the same weak foundation as the other 8(a)(3) allegations in the complaint, i.e., knowledge and animus attributable to nonsupervisory foreman, the Respondent's lawful opposition to the Union as further evidence of animus, and timing. The General Counsel also cites the fact that Goodell remained on first shift and that he and Petit were transferred to other jobs despite being problem employees as evidence of disparate treatment. I find that the General Counsel has not met his burden and that, even if he had, the Respondent would have reassigned Wohlleben and refused to transfer him to another first shift job even if he had not been "busted out" as a union organizer.

There is no dispute that there was little, if any, union activity occurring at the time the second shift was announced. Although Wohlleben had been identified as a union organizer and wore a union T-shirt to work, there is no evidence of concurrent animus other than Plungis' alleged statement that the T-shirt may have had something to do with Duba's denial of Wohlleben's and Michaud's request for a raise. I have already rejected this evidence above. Since it is undisputed that a second shift was necessary in building 274, that Wohlleben was working in building 274 and that the entire crew in that building was reassigned to second shift, it can hardly be said that he was singled out for adverse treatment on August 4. The General Counsel's claim of discriminatory treatment thus boils down to an argument that the Respondent was obligated to find Wohlleben, and no one else, another job on first shift because he was an identified union organizer. While the Act prohibits an employer from discriminating against an employee for union activity, it does not require that employees be given any special treatment as a result of their protected activity. The record is devoid of any evidence that the Respondent had transferred an employee at the employee's request to accommodate the employee's personal needs. On the contrary, all of the evidence in the record shows that transfers were based on the needs of the Respondent. Even the transfers of Goodell and Petit for safety violations were done for business reasons, i.e., to satisfy the concerns of a client and to discipline the employee. Accordingly, I find that the Respondent's reassignment of Wohlleben to second shift did not violate Section 8(a)(1) and (3) of the Act.

As there is no dispute that Wohlleben resigned his employment and was not terminated, the General Counsel argues that his resignation was a constructive discharge because it was caused by the allegedly discriminatory reassignment to second shift. Under Board law, there are two elements necessary to

prove an unlawful constructive discharge: (1) the burdens imposed on an employee must cause, or be intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign; and (2) it must be shown that those burdens were imposed because of the employee's union activities. *Crystal Princeton Refining Co.,* 222 NLRB 1069 (1976). Even assuming that Wohlleben's reassignment to second shift on a temporary basis would satisfy the first element because of the child care difficulties it imposed on him, the second element has not been met. I have already found that the reassignment was not discriminatorily motivated. Accordingly, Wohlleben's response to this lawful change in working conditions was not a constructive discharge within the meaning of the Act. I reaching my conclusion, I have also noted Wohlleben's admission that he was looking to leave the Respondent's employ and go to work for a union contractor before the second shift was announced and that was why he became a union organizer. Under these circumstances, it is not entirely clear that Wohlleben's resignation was the result of the reassignment to second shift and not his own desire to improve his wages and benefits by joining the Union. Accordingly, I shall recommend dismissal of these allegations of the complaint.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities and the union activities of other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating Robert Gauvin on February 28, 1997, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondent did not violate the Act in any other manner alleged in the consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Ferguson Electric Co., Inc., Plainville, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Discharging or otherwise discriminating against any employee for supporting Local 90, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Gauvin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gauvin whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Plainville, Connecticut and at all of its jobsites in Connecticut copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 24, 1998

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your or your coworkers' union support or activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 90, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Gauvin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Robert Gauvin, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

FERGUSON ELECTRIC CO., INC